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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 51

*Petitioner  
not printed*

JOHN HARVEY HALEY,

*Petitioner,*

vs.

THE STATE OF OHIO,

**BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE OF OHIO**

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## INDEX

	Page
Reports of opinions in courts below	1
Grounds upon which jurisdiction is invoked	1
Assignments of error	5
Statement of the case	2
Assignment of error no. 1	5
Assignment of error no. 2	17
Assignment of error no. 3	17
Appendix	17
Common pleas court opinion	17

## CASES AND STATUTES

<i>Anderson v. United States</i>	14
<i>Ashcraft v. Tennessee</i>	7, 10
<i>Ashcraft &amp; Ware v. Tennessee</i>	11
<i>Chambers v. Florida</i>	6, 8
<i>Lisenba v. California</i>	16
<i>Malinski v. New York</i>	7, 11
<i>McNabb v. United States</i>	13, 15
<i>United States v. Mitchell</i>	15
<i>White v. Texas</i>	9

## STATUTES

Section 1639-27, General Code of Ohio	6
Section 13432-3, General Code of Ohio	6
Section 13432-15, General Code of Ohio	5

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**Opinion in Courts Below**

The official reports of opinions delivered in the Courts below are as follows:

Supreme Court of Ohio, 147 Ohio State 340;  
Court of Appeals of Ohio, 79 Ohio Appeals 237.

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**Grounds Upon Which the Jurisdiction of This Court Is  
Invoked**

1. The admission in evidence of the confession of Petitioner which had been obtained while Petitioner was in the custody of the police and before he was taken before the

Juvenile Court, or before any committing magistrate, and which was obtained following prolonged questioning and physical violence while Petitioner was denied access to his attorney, is a violation of the Fourteenth Amendment to the Constitution of the United States, and the rights of Petitioner under said amendment are thereby affected.

2. The judgments of the Courts of the State of Ohio in the admission of the above-described confession in evidence are not in accord with the applicable decisions of this Court.

### **Statement of the Case**

The Petitioner, John Harvey Haley, a fifteen-year-old colored boy, a Senior at McKinley High School in the City of Canton, Ohio, was indicted for murder in the first degree for the killing of one William Karam on the night of October 14, 1945. He was tried by a jury on that charge in the Common Pleas Court of Stark County, Ohio, and the jury returned a verdict of guilty with a recommendation of mercy. Motion for new trial having been overruled, he was sentenced to the Ohio State Penitentiary for life. Appeal was duly taken from this judgment to the Court of Appeals of the Fifth Appellate District of Ohio, which Court, on October 25, 1946, affirmed the judgment of the Common Pleas Court of Stark County. Appeal was then prosecuted to the Supreme Court of the State of Ohio, both as of right, because a constitutional question was involved, and subject to the allowance of a motion for leave to appeal. On January 15, 1947, the Supreme Court of Ohio dismissed the appeal as of right, and overruled the motion for leave to appeal.

The evidence showed that early in the evening of October 14, 1945, Petitioner Haley, and two other boys, Willie Lowder and Al Parks, met in a confectionery in Canton where they spent some time. A discussion about

guns having taken place, Haley said that his landlord had one (R. 185). He went to his home, got a Colt 32 Automatic from a trunk in the bathroom, and gave it to one of the other boys. They then went out for a walk, with the intention of going out into the woods to do some shooting, which, however, they did not do (R. 108-9). Near midnight, after they had been walking for some time, they arrived in front of the confectionery owned and operated by William Karam, at the northwest corner of Market Avenue, South, and Navarre Road, Southwest, in the City of Canton, Ohio. One of the boys suggested that they go in and get a Coca-Cola, but Haley did not want to, so the other two went in and Haley waited for them outside (R. 204). In a few moments, Haley heard a shot inside the store and ran away. When he saw the other boys the next day, they would not tell him what had happened.

Karam staggered out the door of his store, fell to the sidewalk, and died in the ambulance on the way to the hospital of a gunshot wound.

Several days later, on October 19, 1945, two police cruisers, loaded with detectives and officers, descended upon Haley's home in the middle of the night and hauled him off to the Detective Bureau in Canton (R. 188). There followed the sorry spectacle of police and detectives beating and questioning this fifteen-year-old boy in relays through the night, for six or seven hours. (The police officers admitted the questioning in relays, but smugly denied the beating on the stand, but Haley's ripped and torn shirt and trousers were introduced in evidence as defendant's Exhibits 1 and 2 (R. 82), and Haley testified to the beatings he received) (R. 85). His constitutional rights were not explained to him; he was not taken then or for several days thereafter before the Juvenile Court; no report was made to the Juvenile Court; he was never taken to the Municipal Court of the City of



Canton, or before any other committing magistrate (R. 96); he was held incommunicado in the City Jail for several days; his mother and his attorney were denied access to him (R. 96). As one of the officers put it on the stand, "A stopper was put on him" (R. 79).

Early in the morning of October 20, 1945, the police typed a confession which they forced Haley to sign, in which there appeared the statement that the three boys intended to rob Karam and that Haley stayed outside to act as lookout while the other two boys went in. This was categorically denied by Haley on the stand (R. 204). Several days after this confession was extracted from him, Haley was removed from the Canton City Jail to the Stark County Jail, and then for the first time was taken before any magistrate when he was taken to the Juvenile Court of Stark County.

At the trial of the case, the State of Ohio offered in evidence the confession, which is herein referred to. It was objected to by the defendant on the ground that its use under these circumstances would constitute a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The objection having been overruled by the trial court after hearing the evidence on the question of the voluntariness of the confession in the absence of the Jury, the confession was admitted in evidence (R. 98), and it was the only evidence which in any way connected Petitioner with the crime charged in the indictment. It is conceded that the case for the State stands or falls on the validity of the confession.

The question of the admissibility of this confession in evidence under the Fourteenth Amendment to the Constitution of the United States was first raised by Petitioner by objection to its admission at the trial, and the point was reiterated on motion in the trial court to direct a verdict in favor of the defendant, in brief and argument on motion for

new trial in the trial court, and in assignments of error, brief and argument in both the Court of Appeals for the Fifth Appellate District of Ohio and the Supreme Court of Ohio.

### **Assignments of Error**

- I. The Court of Common Pleas of Stark County, Ohio, erred in admitting in evidence the confession of Petitioner which had been obtained while Petitioner was in the custody of the police and before he was taken before the Juvenile Court, or before any committing magistrate, and which was obtained following prolonged questioning and physical violence while Petitioner was denied access to his attorney, because the use in evidence of a confession so obtained is a violation of the Fourteenth Amendment to the Constitution of the United States.
- II. The Court of Appeals of the Fifth Appellate District of Ohio erred in affirming the judgment of the Court of Common Pleas of Stark County, Ohio.
- III. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals of the Fifth Appellate District of Ohio, and in dismissing the appeal of petitioner from that judgment.

### **Argument**

#### **ASSIGNMENT OF ERROR No. I**

The statutes of the State of Ohio involved in this Assignment of Error are:

SECTION 13432-3, GENERAL CODE OF OHIO, which provides:

"Duty of peace officer arresting without warrant.—When a peace officer has arrested a person without a warrant, he must without unnecessary delay, take the person arrested before a court or magistrate having

jurisdiction of the offense, and must make or cause to be made before such court or magistrate a complaint stating the offense for which the person was arrested."

SECTION 13432-15 OF THE GENERAL CODE OF OHIO, which provides:

"Right of attorney to visit prisoner.—After the arrest of a person, with or without a warrant, any attorney at law entitled to practice in the courts of this state may, at the request of the prisoner, or any relative of such prisoner, visit the person so arrested and consult with him privately. • • •"

SECTION 1639-27 OF THE GENERAL CODE OF OHIO, which provides in part:

"If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to the place of detention designated by the court, and the officer taking it shall immediately notify the court and shall file a complaint when directed to do so by the court. • • •"

The sole contention of the Petitioner in this cause is that the methods used in obtaining the confession, which alone supports the conviction, are such that the use of the confession in evidence is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

This Court has repeatedly held that it is not bound by the findings of the State Courts on the question of whether or not the confession was properly obtained, but will make its own independent investigation of the facts. In *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716, the first syllabus provides:

"1. The Supreme Court of the United States is not precluded by the verdict of the jury in a case in which a conviction of a capital offense was obtained upon a



confession, from determining for itself whether the confession was improperly obtained where the convicted person has seasonably asserted his constitutional right to have his guilt or innocence determined without reliance upon a confession improperly obtained."

It should be noted, in passing, that the Petitioner here did "seasonably assert his constitutional right" by raising the issue at the earliest opportunity; namely, when the confession was first offered in evidence in the trial court. Two other important cases on this point are *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. Ed. 1192, where the first syllabus provides:

"1. Where the claim is made of denial of due process in the State Court by obtaining a conviction through use of a confession procured by coercion, the Supreme Court of the United States is bound to make an independent examination of the record to determine the validity of the claim, and the performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both."

and, *Malinski v. New York*, 324 U. S. 401, 89 L. Ed. 1029, where the first syllabus provides:

"1. The question whether there has been a violation of the due process clause of the Fourteenth Amendment, by the introduction of an involuntary confession in a criminal prosecution in a State Court, is one on which the Supreme Court must make an independent determination on the disputed facts."

All the facts in the case at bar indicate a violation of the Fourteenth Amendment in accordance with the doctrine laid down by this Court in a long line of decisions. This boy was subjected to relentless questioning by relays of officers throughout the night. Great care was taken to keep him away from his family and his attorney. He was not then, or for several days thereafter, taken before a com-

mitting magistrate. No report was made to the Juvenile Court, nor was he taken to that Court—all in violation of the statutes of the State of Ohio. He was beaten and kicked. The overwhelming weight of the evidence so indicates, in spite of the denial by the police. In short, the record shows that the police knew the only way to get a conviction was to obtain a confession, and they did not care what methods were used to obtain it. The police undertook to assume that their authority was paramount to that of the legislature of Ohio. The Fourteenth Amendment strikes down that method of obtaining evidence.

An examination of the decisions of this Court reveals that the police methods used in this case are precisely those which this Court has unequivocally condemned every time the question has arisen. For example, in *Chambers v. Florida, supra*, the proposition was established that use by the State of an improperly obtained confession to procure conviction of crime, may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment; and, in the language of the fourth syllabus of that case: "the due process provision of the Fourteenth Amendment was intended to guarantee procedural standards adequate and appropriate then and thereafter to protect at all times persons charged with, or suspected of crime, by persons holding positions of power and authority."

Having established the rule that an improperly obtained confession may constitute a denial of due process, it next becomes important to determine what circumstances are to be taken into consideration in deciding whether a particular confession is improperly obtained, and, again, the language of the third syllabus states the proposition concisely:

"3. Confessions of the commission of a robbery and murder must be deemed involuntary so as to render their use in obtaining convictions a violation of the

due process clause of the Fourteenth Amendment, where obtained from young negroes arrested without warrant, held in jail without formal charges, and without being permitted to see or confer with counsel or friends, believing that they were in danger of mob violence, made at the end of an all-night session following five days of fruitless questioning, each by himself, by State Officers and other white citizens, in the presence of from four to ten white men, and after a previous confession had been pronounced unsatisfactory by the Prosecuting Attorney."

*Seven points of striking similarity between Chambers v. Florida and the case at bar are immediately apparent:*

- (1) In both cases a negro was arrested following the murder of a white man.
- (2) In both cases the defendant was held in custody without a warrant, and was not taken before a committing magistrate.
- (3) In both cases the confession followed prolonged questioning by police officers varying in number from four to ten.
- (4) In both cases the evidence was in sharp conflict as to whether or not there had been physical violence.
- (5) In both cases the defendant was denied access to counsel or to his friends.
- (6) In both cases the prisoner was arraigned several days after he confessed.
- (7) In both cases the conviction of murder in the first degree stood on the confession alone.

*White v. Texas*, 310 U. S. 530, 84 L. Ed. 1342, also presents facts which are quite similar to those of the case at bar.

In that case the confession was obtained after the defendant, an illiterate farm hand, had been held in jail for several days without charges filed against him, without legal coun-

sel, and out of touch with his friends or relatives. On several nights he had been taken, handcuffed by armed officers, out into the woods for interrogation, and while he was in jail the Sheriff put the defendant by himself and kept watching and talking to him. The confession was obtained after interrogation by the County Attorney from approximately 11:00 P. M. to 3:00 or 3:30 A. M., during which period the officers who had taken him out to the woods were in and out of the room. The prosecution was for rape, and the prisoner was arrested without warrant. Again, the testimony was in conflict on whether or not he had been beaten and whipped while out in the woods. This Court, on the authority of *Chambers v. Florida, supra*, held the use of the confession to be a violation of the Fourteenth Amendment, and the language at page 1345 of 84 L. Ed. is particularly appropriate to the case at bar:

“Due process of law preserved for all by our Constitution, commands that no such practice as that disclosed by this record, shall send any accused to his death.”

The next time a question similar to the one at bar was presented to this Court, was *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. Ed. 1192, in which the Petitioner's conviction of murder was based solely on a confession obtained before he had been arraigned, and after about 36 hours of practically continuous questioning by relays of officers, at the end of which time the confession was reduced to writing, but was not signed. The conclusion to which this Court came in reversing the conviction is well stated in the second syllabus:

“2. The use in a State Court in obtaining a conviction of murder as an accessory before the fact of a confession made by the victim's husband, a skilled dragline and steam shovel operator, of excellent reputation, who

had been arrested merely on suspicion, near the end of a thirty-six hour period of practically continuous questioning, under powerful electric lights, by relays of officers, experienced investigators and highly-trained lawyers, is by reason of the inherently coercive effect of such interrogation a violation of constitutional right."

This case indicates that it is not the use, or lack of use, of physical violence on which these decisions rest, but rather on the inherently coercive effect of the police methods used. Again, the elements which are present in the *Ashcraft* case are the same as those in the case at bar—continuous questioning, relays of officers, the defendant unable to have the benefit of the advice of his friends or his attorney.

It should be noted, in passing, that the *Ashcraft* case was presented again to this Court in *Ashcraft & Ware v. Tennessee*, 327 U. S. 274, 90 L. Ed. 667 which followed a re-trial of the case in the trial court. At the second trial, instead of introducing in evidence the written confession, the prosecution offered the testimony of the officers and other persons who were present during the questioning of the defendant, to show the oral statements made by him leading up to the written confession. It is, of course, obvious that this was just as much a denial of the defendant's constitutional rights as had been the previous admission in evidence of the written confession, and on that ground the conviction was again reversed.

Possibly the strongest of all the cases coming up from the State Courts, because of the fact that the decision is based not on any positive acts done by the police, but on the atmosphere of fear in which the defendant was placed, is *Malinski v. New York*, 324 U. S. 401, 89 L. 7d. 1029. In that case the petitioner was arrested on October 23, 1942, and taken to a hotel in Brooklyn, where he arrived about



8:00 o'clock in the morning. He was immediately stripped and kept naked until 11:00 A. M., at which time he was given a blanket. He remained that way until about 6:00 o'clock P. M. The evidence was in conflict as to whether he was beaten during that period, but this Court, for the purpose of the decision, assumed that he was not. He was subjected to intermittent questioning during the day, and made an oral confession about 6:00 o'clock in the evening. He was kept in the hotel that night and for the next three days. He was taken to the scene of the crime, questioned intermittently during that period, and on the 27th day of October, he signed a written confession, after which he was arraigned. During the time of the questioning and while he was held in the hotel, he was denied access to his attorney or to his friends.

After repeating the proposition that the use of a coerced or compelled confession to procure conviction of crime constitutes a violation of the due process clause of the Fourteenth Amendment, this Court goes a step beyond the rule of the previous cases, as is indicated by the language of the third and fourth syllabuses:

"3. If a coerced confession by the accused is introduced at the trial, *a judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict.*" (Emphasis added.)

"4. A confession will be deemed to have been coerced so as to make its introduction in evidence a denial of due process where a defendant charged with murder in the commission of a robbery, upon being arrested was taken to a hotel, stripped to see whether he had any wounds, and not allowed for several hours to put on his clothes, was not allowed to see a lawyer although he asked for one, or any friends other than one also charged with participation in the robbery; whereupon, after being held from 8:00 A. M. to 6:00 P. M., he con-

fessed although he was not subjected to more than occasional questioning, or anything except his own apprehension that he might be beaten." (Emphasis added.)

Because of the fact that there was evidence in the *Malinski* case which might have been sufficient to sustain the verdict even aside from the confession, and because of the fact that the questioning was only occasional and the principal factor was the defendant's apprehension of what might happen to him, it would seem that the case at bar is a *fortiori* to that case.

While the cases which have come up from lower Federal Courts do not rest upon the Fourteenth Amendment, as the cases from the State Courts must, nevertheless those decisions are of importance here because this Court has, on considerations of fundamental liberty and natural justice, applied the same tests to the Federal cases as the Fourteenth Amendment requires to be applied to the State cases. The Fourteenth Amendment assures natural justice to the individual as against the State, and it is, therefore, important to examine the Federal cases to determine what sort of conduct this Court considers to be repugnant to considerations of natural justice. For example, in *McNabb v. The United States*, 318 U. S. 332, 87 L. Ed. 819, the defendants were arrested, and while they were being held in jail and before they were taken before a United States Commissioner, they confessed. The confessions followed prolonged questioning, *but it was not contended that they were involuntary*. The Federal Statute required the arresting officer to take the accused before a United States Commissioner immediately after his arrest. The questioning was continuous and unremitting over a period of two days, and the defendants were ignorant and inexperienced young men, who were without the aid of friends or the benefit of

counsel. They were advised by the officers that they did not have to make a statement and that they need not fear force, that any statement made by them would be used against them, and that they need not answer any questions unless they so desired. At page 345, Mr. Justice Frankfurter, speaking for the Court, said: "Plainly a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded, cannot be allowed to stand without making the Courts themselves accomplices in wilful disobedience of the law."

Inasmuch as the Federal Statute involved in the *McNabb* case was almost identical in language with the Statute of the State of Ohio involved in the case at bar, it would seem sound to say that a conviction resting on evidence secured through a flagrant disregard of the procedure which the legislature of Ohio has commanded, cannot be allowed to stand without making the Courts themselves accomplices in wilful violation of the Fourteenth Amendment. The *McNabb* case, in substance, holds that the authority of Federal officers is not paramount to that of Congress, and we think that our position is unassailable when we say that the Fourteenth Amendment prevents the authority of State Police Officers from being paramount to that of the State Legislature.

In *Anderson v. The United States*, 318 U. S. 350, 87 L. Ed. 829, the defendants were arrested by State Officers, and subjected to intermittent questioning over several hours; they were not taken before a committing magistrate in violation of the Statute of the State of Tennessee, which provides that no person can be committed to prison for any criminal matter until examination thereof be first had before some magistrate. The confessions obtained while the defendants were in the custody of State Officers were admitted in evidence in the Federal prosecution, and the

conviction was reversed by this Court on the authority of *McNabb v. The United States, supra*, the decision again being based on considerations of justice; and, as in all the cases, there were present the elements of intermittent questioning over a period of some time, refusal to permit the defendants to consult with their friends, relatives, or counsel, and the holding of the defendants in custody without arraignment, in violation of the law.

It appears to us to be an obvious absurdity to hold that confessions so obtained in violation of the State law are not admissible in a Federal prosecution because the method of their obtaining is a violation of natural justice, and at the same time to say that the Fourteenth Amendment permits their use in a prosecution under the State law.

This Court, in *U. S. v. Mitchell*, 322 U. S. 65, 88 L. Ed. 1140, in commenting on the *McNabb* case, observed:

"That case respected the policy underlying enactments of Congress, as well as that of a massive body of State legislation, which, whatever may be the minor variations of language, require that arresting officers shall with reasonable promptness bring arrested persons before a committing authority."

And, again,

"Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours, under psychological pressure, were the decisive features in the *McNabb* case, which led us to rule that a conviction on such evidence could not stand."

Again we urge that if it is contrary to natural justice to use this type of confession in a Federal prosecution, it is contrary to the Fourteenth Amendment to use it in a State prosecution. A set of facts cannot exist which could

logically be said to be contrary to natural justice and at the same time consistent with the Fourteenth Amendment.

In the Courts below, counsel for the State of Ohio have placed great reliance on *Lisenba v. California*, 314 U. S. 219, 86 L. Ed. 166, where the conviction was affirmed by this Court. That case, however, is readily distinguishable from the case at bar, because in that case,

(1) The confession was not made for eleven days after the time when the defendant was subjected to the questioning and physical ill-treatment.

(2) Before the confession, the defendant had been afforded a full opportunity to see and consult with his attorney.

(3) The conviction did not depend upon the confession alone.

(4) The Constitutional question was not raised at all at the trial, nor until re-hearing in the Supreme Court of California.

Actually, *Lisenba v. California*, *supra*, does not represent a departure from the rule laid down in the other cases, as is apparent from the seventeenth syllabus:

"17. Where a prisoner held incommunicado has been subjected to questioning by officers for long periods, and deprived of the advice of counsel, and has made a confession used in obtaining his conviction, the Supreme Court of the United States will scrutinize the record with care to determine whether by the use of his confession he has been deprived of liberty or life through tyrannical or oppressive means."

Factually, the case is different from the case at bar, and presents a different pattern from those other cases to which we have referred in this brief, but the same principle of law which led this Court to affirm the conviction in that case requires the setting aside of the conviction in this case.



The soundness of all the reasoning and argument which produced the doctrine which this Court has laid down in the cases discussed in this brief, and the importance of all the protection which the Fourteenth Amendment surrounds a person charged with crime, are emphasized and highlighted by the situation which is now presented to the Court in the case at bar; namely, the fact that the petitioner is a fifteen-year-old boy. If due process, as this Court has so often held, requires proper police methods and strict compliance with the State law in the case of an adult, how much more is that true in the case of a child? Due process becomes, what this Court has always refused to let it become, merely a pretty phrase if the confession of a child obtained as this one was, is permitted to be used to deprive him of his liberty.

#### ASSIGNMENTS OF ERROR NOS. II AND III

The arguments advanced under the First Assignment of Error are the same arguments in support of the Second and Third Assignments of Error, and will not be repeated, but for the same reasons therein advanced we submit that the Courts of the State of Ohio were in error in permitting the introduction of the confession in evidence, because its use constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that, therefore, this Court should reverse the judgments of the Courts below.

Respectfully submitted,

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**APPENDIX****IN THE COURT OF COMMON PLEAS****No. 13,978**

**STATE OF OHIO,**  
**Stark County, ss:**

**STATE OF OHIO, Plaintiff,**

**vs.**

**JOHN HARVEY HALEY, Defendant**

**MEMORANDUM**

**Counsel for Plaintiff: The Prosecuting Atty.**

**Counsel for Defendant: Amerman, Mills, Mills, Jones & Mansfield.**

**SWEITZER, J.:**

1. There are or have been before the court on motions for new trials, three companion criminal actions, numbered 13,978, *Ohio v. Haley*, 13,979, *Ohio v. Lowder* and 13,980, *Ohio v. Parks*, in connection with which verdicts of guilty of murder in the first degree recommending mercy, have been returned. In separate indictments each defendant is charged with having on or about October 14, 1945 in Stark County, Ohio, committed the crime of unlawfully, purposely and while attempting to perpetrate robbery, killing one William Karam, then and there being, contrary to the statute, etc., Section 12,400 G. C. As observed, the indictments are separate, the defendants not having been charged jointly in the indictment, with the commission of crime. Each defendant was tried separately, defendants Haley and Lowder by a judge and a jury, and defendant Parks, by a three-judge court. As the questions raised by the separate motions are not identical, each motion, of course, must be considered and ruled on separately from the others.

2. For comments on questions raised in common by motions for new trial in case 13,979, *Ohio v. Willie Lowder* and

in the instant case, counsel are referred to the memorandum denying a new trial in said Lowder case, which is on file in the clerk's office. It is believed some of the grounds urged by counsel for defendant in the instant case result from counsel not having had for reference at the time the motion and brief in support thereof were prepared, a copy of the charge in the Haley case. Particularly does this seem to be true in connection with the part of the judge's charge relating to the element purposeful or intentional killing. It is thought that element is amply explained in the charge to the jury. It is referred to several times in the charge. The alleged ground that the so-called confession should have been denied admission in evidence because of the statutes applicable to juvenile court procedure is referred to and considered in said memorandum in *Ohio v. Lowder*.

Juvenile Court Act, original and as amended;

*Malone v. State*, 130 O. S. 443;

*State v. Marinski*, 139 O. S. 559.

3. The two alleged grounds given most attention in considering this motion relate to the questions, first, whether the submitting of the so-called confession to the jury for determining its voluntariness, defendant contending and the State denying, its submission violates the due process provision of the constitution, and, second, the injection of several remarks and questions on the part of the assistant prosecuting attorney, the defendant claiming and the state denying, that this constitutes reversible prejudicial misconduct on the part of the state. Their injection in the trial, of course, was irregular and constitutes improper trial procedure. It appears, however, that in each instance, upon objection being made in behalf of the defendant, the trial judge repudiated the said conduct on the part of the state and in effect instructed the jury to disregard same. It is believed the prompt repudiation by the judge dispelled any harm to the defendant that might have resulted to him had the judge acquiesced in the injection of said comments, questions and remarks. The authorities seem to indicate that before error of the sort in question constitutes a basis for setting a verdict aside, etc., the misconduct of counsel must be not only erroneous but prejudicial to the defendant.

as well. In the light of all the evidence in the case it is not thought the conduct of the assistant prosecuting attorney complained of by defendant, constitutes prejudicial error warranting setting the verdict aside.

Michigan Law Review of December, 1945, Vol. 44, No. 3;

McNabb v. U. S., 318 U. S., 63 Sup. Ct. R. 608;

Palmore v. State, 244 Ala. 229, 12 So. 2nd 856;

People v. Goldblatt, 383 Ill. 188, 99 N. E. 2nd 41;

Common v. Mayhew, 297 Ky. 178, 178 S. W. 2nd 932;

Ashcraft v. Tenn., 64 Sup. Ct. R. 921, 322 U. S. 143;

Snook v. State, 34 O. A. 60, Aff. by Supreme Court;

Spears v. State, O. S. 583;

Burdge v. State, 53 O. S. 512;

Section 13,432-15 G. C.;

Section 13,432-16 G. C.;

Statutes requiring that persons under eighteen years of age be taken before juvenile judge,—

Warder, B. & G. Co. v. Jacobs; 58 O. S. 77;

Hayes v. Smith, 62 O. S. 161;

State v. Thayer, 124 O. S. 1.

In considering this motion the theory on which this prosecution was tried has been kept in mind. Of course, the burden is on the state to establish beyond a reasonable doubt, all material elements of the crime charged, to wit, purposely killing Karam while in the perpetration of an attempt to rob him. The defense was made almost exclusively, on the contention that the defendant was an innocent bystander without knowledge or information that his associates entered the confectionery in question for the purpose of, and with the intention of committing robbery. The evidence, the opening statement for the defendant and the arguments in behalf of the defendant, all of which were taken by the reporter so indicate. Defendant's so-called confession, however, is to the effect he was a joint participant and confederate in the actual planning and perpetration of the attempted robbery and murder in question. The state claims that the defendant and his two associates jointly planned the robbery, jointly participated in the attempt to perpetrate it and are confederates and joint participants in the murder involved. It is believed

the jury in the light of the evidence was fully warranted in returning the verdict, which was returned, viz. guilty of murder in the first degree, recommending mercy. And further it is believed that prejudicial error warranting setting the verdict aside, did not intervene at the trial. Some authorities not heretofore cited, relied on in part by the judge at the trial of the case are,

*Stephena v. State*, 42 O. S. 150;  
*Conrad (Castor) v. State*, 75 O. S. 52;  
*Bandy v. State*, 102 O. S. 384;  
*Ohio v. Turk*, 120 O. S. 245, 48 O. A. 480;  
*State v. McKinney*, 64 N. E. 2nd 129;  
*State v. Colley*, 65 N. E. 2nd 159;  
*Thomas, Warden v. Mills*, 117 O. S. 114;  
*Burchett v. State*, 35 O. A. 463.

Arrangements will be made to have the defendant and his counsel in court promptly, when official ruling on defendant's motion will be made, and in the event said motion should be then officially denied, sentence will be pronounced.

(2401)